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IN THE

Supreme Court of the United States

October Term, 1967

No. 27

FEDERAL TRADE COMMISSION,
Petitioner,

v.

FRED MEYER, INC., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION AND BRIEF *AMICUS CURIAE* OF ATLANTIC COAST INDEPENDENT DISTRIBUTORS ASSOCIATION, INC.

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MOTION OF ATLANTIC COAST INDEPENDENT DISTRIBUTORS ASSOCIATION, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Atlantic Coast Independent Distributors Association, Inc. ("ACIDA") respectfully moves for leave to file the annexed brief *amicus curiae* in this case. The Solicitor General, attorney for Petitioner, Federal Trade Commission, has consented to the filing of such a brief. Respondent has refused to do so.

ACIDA is a trade association comprised of approximately 225 independent wholesale distributors of newspapers, periodicals, paperback books and children's books in 21 states in the eastern portion of the United States. ACIDA members sell their wares to stores, schools, supermarkets—anyone who has need for books or the room for a book or magazine rack.

ACIDA members have a vital interest in this case for the resolution of the question on which ceriorari has been

granted is of critical importance to wholesalers and will have ramifications which will reach to the very roots of the periodical and paperback distribution industry. The type of practice now before this Court is a day-to-day occurrence in the distribution of periodicals and paperbacks. The suppliers of the ACIDA member wholesalers (the publishers and their captive national distributors) frequently make direct sales to retail outlets with the two-fold effect of taking business from the wholesalers and creating competition for the customers of the wholesalers. These sales are made in an unfair and discriminatory manner.

ACIDA members thus compete with their suppliers. And the customers of each are in competition. As we will show in our brief, if leave is granted, it is a stacked competition. Wholesalers and their customers are discriminated against while the suppliers hide behind hypertechnical interpretations of the Robinson-Patman Act (15 U.S.C. §§ 13, 13a) which denude it of significance.

ACIDA believes that when viewed from the point of view of the wholesaler—the man in the middle—the Commission's determination in this case was correct and indeed necessary for the survival of all independent wholesalers.

ACIDA respectfully requests leave to be heard.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE ATLANTIC COAST INDEPENDENT DISTRIBUTORS ASSOCIATION, INC. IN SUPPORT OF PETITIONER'S INTERPRETATION OF THE ROBINSON-PATMAN ACT

Statement

This brief *amicus curiae* is submitted on behalf of the Atlantic Coast Independent Distributors Association, Inc. ("ACIDA"), in accordance with Rule 42(3) of the Court's Rules and in support of Petitioner's position.

Interest of the *Amicus Curiae*

ACIDA is a trade association representing more than 225 independent wholesale distributors of newspapers, periodicals, children's books and paperback books (hereinafter

sometimes collectively referred to as periodicals and paperbacks) located in 21 states in the eastern portion of the United States.

The evil present in the case at bar is rampant in the distribution of periodicals and paperbacks. The suppliers of the wholesalers are actively engaged in anti-competitive activities designed to skim-off the cream of the wholesalers' business. Thus, the publishers and national distributors—upon whom wholesalers depend for their product—make direct sales to selected retailers. Naturally, these are the large, high-volume retailers. The publishers and distributors are able to capture this prime business because they resort to discriminatory devices that make it impossible for the wholesalers to compete with them. The same activities also puts the retail customers of the wholesalers at a disadvantage vis a vis the direct buying retailers.

It must be recognized that wholesalers play a crucial role in the chain of distribution. They constitute the primary link with retail establishments and the only link to small retailers, to out of the way retailers and for the non-mass market titles. Where there is no wholesaler, literature simply does not reach the public except for a few fast-moving items sold in mass-volume stores.

Rapid distribution of periodicals and inexpensive paperbacks at multiple and convenient points throughout the United States has been achieved through a four level distribution system: Publisher to national distributor to wholesaler to retailer. It is the deviation from this scheme, and a deviation practiced in an unfair manner, which gives rise to ACIDA's complaints. It is the discriminatory direct sale by the publisher or national distributor to retailers which has created a compelling urgency for protection.

The publisher stands astride the distribution system as its ruling monarch. All of its products are protected

by copyrights; it holds an absolute monopoly and wields absolute power. The good will—or at least the absence of malice—of the publisher is essential if a wholesaler is to remain in business. A wholesaler would be hard put to remain in operation without the business, for example, of Curtis Publishing Company. This giant publishes many magazines including Saturday Evening Post, American Home, Holiday, Jack and Hill and Ladies Home Journal, to name a few. These are the backbone of the magazine business: the popular fast-moving items.

The publishers do not sell directly to wholesalers. Rather, they pass their products on to national distributors. These concerns are, in fact, captive creatures of their publishers. No publisher sells to more than one national distributor.

Thus, Curtis Publishing Company distributes its materials through Curtis Circulation Company. This national distributor not only distributes the entire line of Curtis materials but is the wholesaler's exclusive source for Look, Newsweek, New Yorker, Vogue, Atlantic Monthly, Esquire, Field and Stream, Glamour, Harpers, House and Garden and Mademoiselle, *inter alia*. Curtis Circulation is also the sole distributor of Bantam Books and Wonder Books for children. The latter account for nearly 50% of the sales of children's books. The wrath of this company would mean the destruction of the wholesaler involved. (All franchise agreements between national distributor and wholesaler are claimed by all national distributors to be terminable without cause.)

Select Magazine is another national distributor. It is a joint enterprise of the publishers of Time, Life, Readers Digest and McCalls. It handles those magazines as well as Better Homes and Gardens, Fortune, Popular Science, Redbook, The World Almanac, Sports Illustrated and U. S. News and World Report.

No two national distributors carry the same titles.

Next in the normal chain of distribution come the wholesalers. These are the local businesses that deliver a full line of materials to all takers, wherever located and in whatever quantities they desire, with full return privileges.

The gross volume of wholesalers ranges from less than $100,000 to as much as a few million dollars. The average net profit of the wholesaler, after taxes, has been between less than one percent to 2.55 percent over the past nine years. The profit figures showed a decline in 1966.*

In the main, wholesalers are one-man or family businesses. They are locally owned and operated by men of integrity and achievement in their communities.

In distributing his product to the retailer the wholesaler is required by the publisher (and its captive national distributor) to perform a host of services.**

The wholesaler musts accept publications on an allotment system fixed by the national distributor. The wholesaler must maintain a huge inventory.*** The wholesaler must place the materials on the racks in the stores, he must pick up returns of unsold merchandise and give credit for them and he must make regular checks-ups of the retailers racks. And, of course, he bears the risk of loss and the credit risks.

These requirements, arbitrarily imposed by the publisher and national distributor often bears no economic re-

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* 1966 Income Survey of Wholesalers prepared by Arthur Young & Co.

** Wersay required because the penalty for non-compliance is the loss of the "franchise." Loss of a franchise spells the end of the wholesaler, the destruction of years of work and the rendering valueless of the huge inventory which the wholesaler is required to keep along with his warehouse, trucks, etc.

*** These inventories run from two to ten times monthly sales,

lationship to the business done and frequently make no sense in terms of what is actually needed and required. But this is of no concern to the publishers and national distributors. The expenses do not come out of their pockets.

In spite of all these difficulties, the wholesalers have been able to hang on and even to operate profitably, primarily because they can do a high volume business with supermarkets and large stores in fast moving items. After all it takes very little more time and truck expense and costs very little more money to rack 200 items than to rack 20.

But, the publishers and national distributors are aware of this prime business and attempt to skin-off the cream by making direct sales to these high-volume retailers. They systematically make sales to retailers who are able to give them high volumes in a few fast-moving periodicals and paperbacks. This, of course, circumvents the wholesaler and may deprive him of the fruits of years of effort in building up the outlet concerned.

And what are the terms on which the publishers and national distributors make these direct sales?

On occasion, the price to the direct-buying retailer is lower than that given to the wholesaler. This, of course, is the most obvious form of discrimination and is relatively rare because the publishers and national distributors have taken the time to read this Court's decision in *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

But, using a literal reading of *Morton Salt* and without regard to the clear intent of the Robinson-Patman Act (15 U.S.C. §§ 13, 13a), the wholesalers sell to their direct-buying retailers at the same price or a slightly higher price than that at which the wholesalers purchase. Having done this, the publishers and national distributors then say, in all innocence, that they are not discriminating.

This assertion completely ignores the realities. In making the direct sale, the publisher and national distributor furnish a host of services to the retailer. In fact they furnish just about all of the services that the wholesaler normally furnishes to its customers and is required to furnish by his supplier-competitor.

These services are given free of charge to the direct buying retailer. And, of course, they are not given by the publisher or national distributor to the wholesaler or his customers. These unfavored persons must pay for them.

In 1965, the Council for Periodical Distributors Associations (a national organization of wholesalers of which ACIDA is a member) conducted a survey of the impact of direct sales on independent wholesalers. The results are enlightening:

98% of the wholesalers who responded to the questionnaire were faced with direct sales by publishers and national distributors. The survey indicated that such sales were usually at the same price as was charged wholesalers.

73% of those responding said that the publishers had taken established accounts from them by use of direct sales.* In the southeast, wholesalers reported a loss of 20.4% of their accounts because of direct sales between 1955 and 1966. Wholesalers in the mid-Atlantic area showed a loss of 44.3% of their accounts to direct sales in the same period.

And, the wholesalers were almost unanimous in their conclusion that direct sales were made to the cream of the crop; that the best accounts were skimmed off the top, while the smaller and less profitable accounts were left to the wholesalers.

Further, 88% of the wholesalers surveyed stated that they were unable to compete for the business of retail out-

* Thus after years of work to develop a profitable high volume account the wholesaler found himself squeezed out.

lets where the retailers purchased directly. They could not do so simply because they could not meet the price and stay in business.

And, most significantly, 96% of the wholesalers surveyed, responded that in their opinion the survival of independent wholesalers in the publishing industry would be impaired if the current trend toward expansion of discriminatory direct sales should continue unabated.

We believe that these facts speak for themselves.

The Decision of the Federal Trade Commission Recognized the Competitive Realities, Properly Applied the Law, and Was in All Respects Correct.

The Federal Trade Commission handed down what can only be characterized as a landmark decision. It carefully considered the competitive realities and with great perception pierced the technical obstacles hurled at it by the Respondents. The underlying rationale of the Commission's decision was in direct accord with the dominant purpose of the Robinson-Patman Act (15 U.S.C. §§ 13, 13a): to assure equality of treatment for those who do not have the economic power to assure it for themselves.

Wholesalers wield no power over the publishers and national distributors. The small retailer customers of wholesalers wield no power. If might makes right then, and only then, is what is happening in this industry right.

But Congress has determined otherwise. It has determined that fairness is right and its intent ought not be frustrated by the hyper-technical arguments of the Respondent as adopted by the Ninth Circuit.

In its opinion, the Commission noted that the Congressional objective in passing the Robinson-Patman Act (15 U.S.C. §§ 13, 13a) "would be frustrated, of course, if it should be held that promotional allowances accorded to

direct-buying retailers may not be given to wholesalers whose retail customers compete with these favored retailers'' (T65-T66).

In the publishing and distributing industry, the intent of Congress in passing the Robinson-Patman Act (15 U.S.C. §§ 13, 13a) would also be frustrated if the publishers and national distributors are permitted to furnish services, free of charge, to selected direct-buying retailers, and not required to furnish those very same services to the customers of the wholesalers or make a monetary allowance to the wholesalers for the cost of furnishing such services.

We respectfully submit that if a publisher or national distributor furnishes free services to a direct buying retailer, the Robinson-Patman Act (15 U.S.C. §§ 13, 13a) requires, and this Court should hold, that it must also make those services available to the customers of the wholesalers. (Cf. *FTC* v. *Simplicity Patterns, Inc.*, 360 U.S. 55 (1959). True, the retail customer of the wholesaler receives the services. He gets credit, his racks are serviced, his returns are processed. But he pays a dear price in that he must pay more for the material than the direct buying customer of the publisher or national distributor. It is unfair for the publisher and national distributor to assume the role of a wholesaler for a few favored customers and absorb the cost of so doing.

Alternatively, of course, the publishers and national distributors can equalize treatment by making a monetary allowance to the wholesaler for the cost of all these services. A wholesaler purchasing a particular title for 50¢ cannot make it available to his customers for 50¢ and furnish all of the required services; nor can he effectively compete with the publisher and national distributor when they furnish the material in question at 50¢ and throw in all the services gratis. Nor can the wholesaler's customer

who must pay 50¢ plus the wholesalers' cost and small profit compete with the direct-buying retailer who pays only 50¢.

And, of course, service is commutable into price and therefore price and service are interchangeable concepts within the purpose of the Robinson-Patman Act (15 U.S.C. §§ 13, 13a).

F.T.C. v. *Morton Salt Co.*, 334 U.S. 37 (1948) makes it perfectly apparent that the Robinson-Patman Act (15 U.S.C. §§ 13, 13a) will not allow the publishers and national distributors to sell merchandise to direct-buying retailers at a lower price than is granted to the wholesalers.

Yet, in effect, when the publisher or national distributor sells to the wholesaler at a price which may be the same (or even slightly lower) as that to the direct-buying retailer, it is engaging in precisely this form of prohibited discrimination. This occurs because the publisher or national distributor provide the direct buying retailer, at no cost, with all of the services the wholesaler is required to perform and which the wholesalers' customer must buy from the wholesaler. To assert that it is not discriminatory to sell to different levels of distribution at the same price, is to ignore reality. Equality of treatment mandates that the publisher or national distributor furnish to the wholesaler a price concession equivalent to the value of the free services granted to the direct-buying retailer or provide those services to all. The Commission's decision in this case was a first and right step in that direction.

The wholesaler must compete with his own suppliers who have set the ground rules which make competition impossible. The game is, as it were, conducted under rules where the publisher and national distributor are the umpires as well as the competing team. No wonder

the wholesaler and his customers lose every game the publishers and national distributors choose to play.

We respectfully submit that the Commission's decision in *Fred Meyers* was unquestionably correct and is the only realistic approach to the general problems of wholesale distribution and competition to wholesalers from their own suppliers.

CONCLUSION

The decision of the Ninth Circuit should be reversed and that of the Federal Trade Commission reinstated.

Respectfully submitted,

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